UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2002

(Argued: November 27, 2002 Decided: October 16, 2003)

Docket No. 02-7439

BARBARA D. SCHERER,

Plaintiff-Appellant,

v.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Defendant-Appellee.

Before: LEVAL and CALABRESI, *Circuit Judges*, and TRAGER, *District Judge*.[*]

Appeal from a dismissal for lack of a jurisdictionally sufficient amount in controversy. Vacated and remanded.

Trager, District Judge, filed a dissenting opinion.

VICTOR M. SERBY, New York, NY, *for Plaintiff-Appellant*.

ANDREW I. HAMELSKY, Wright, Pindulic & Hamelsky, LLP, New York, NY, *for Defendant-Appellee*.

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[*] The Honorable David G. Trager of the United States District Court for the Eastern District of New York, sitting by designation.

CALABRESI, *Circuit Judge*:

On April 15, 1998, Appellant Barbara D. Scherer instituted a state-court action to recover disability benefits pursuant to her insurance policy with Appellee Equitable Life Assurance Society. A trial followed, resulting in a jury verdict for Equitable on May 3, 2001. On November 19, 2001, while her state case was on appeal, Scherer brought suit in the United States District Court for the Southern District of New York, seeking benefits from April 16, 1998. Her suit was dismissed for want of a jurisdictionally sufficient amount in controversy. The district court (Haight, *J.*) held that the state-court judgment had determined all the issues through May 3, 2001, and that the sum total of benefits that Scherer could have accrued between May 3 and November 19, 2001 fell short of the $75,000 threshold for diversity jurisdiction. We vacate and remand.

The district court's use of preclusion doctrines to winnow down the amount in controversy so that it failed to reach the jurisdictional threshold does not comport with the rule that the amount in controversy is to be ascertained as of the time of filing, without regard to waiveable "affirmative defenses." Scherer's federal complaint, when filed, put in controversy liability for disability benefits from April 16, 1998 to November 19, 2001. Cumulated over that period, Scherer's disability benefits would surpass the $75,000 amount-in-controversy threshold. It is not disputed that the parties are diverse. Accordingly, federal jurisdiction exists.

BACKGROUND

The case at bar arises from a dispute between Scherer and Equitable over benefits for work-related disabilities which Scherer allegedly suffers on account of a deteriorating spinal

condition. After much back and forth, Equitable stopped paying benefits on April 2, 1997. Some twelve months later, on April 15, 1998, Scherer brought an action in state court for breach of contract, seeking "damages to date in the sum of approximately [$66,000]" and a declaration that she was disabled from the time that Equitable had terminated her benefits to the "present date." A trial followed, resulting in a jury verdict for Equitable on May 3, 2001, which Scherer appealed.

On November 19, 2001, while her state case was pending before the New York Appellate Division, Scherer sued in federal court for a preliminary injunction and various other forms of relief, including unpaid disability benefits dating back to April 16, 1998 and a declaratory judgment that certain back premiums demanded by Equitable were not due under the terms of the policy.[1] Equitable opposed the preliminary injunction, in part on the ground that the court lacked jurisdiction because Scherer could not satisfy the amount-in-controversy requirement.[2] Judge Haight treated this jurisdictional argument as a 12(b)(1) motion to dismiss, which, in due course, he granted.

The district court reviewed the state proceedings and held (1) that the state trial had concluded liability for past benefits through May 3, 2001, and (2) that this was res judicata for

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[1] She also sought a lump-sum payment of "accelerated" future benefits, punitive damages, and damages for deceptive practices. The district court ruled out "accelerated benefits" as an item in dispute. The court noted that New York law only allows this form of recovery in insurance disputes where there has been "complete repudiation" by the insurer. Such a complete repudiation, the court said, was incompatible with the allegations of Scherer's complaint. The court also found that punitive damages and recovery for deceptive practices were unavailable under state law. Because of our disposition of this appeal, we do not review these rulings of the district court.

[2] Scherer then amended her complaint, but that change is not relevant to our disposition of the appeal.

purposes of the federal suit. As a result, the only "past benefits" still at issue were those for the period between May 3, 2001, and November 19, 2001. The total monetary value of those benefits, added to the back premiums that Scherer sought to avoid paying, totaled no more than $26,415. Since this was well below the $75,000 amount-in-controversy threshold for federal diversity jurisdiction, the case was dismissed. This appeal followed.

The central question on appeal is whether the district court correctly employed preclusion doctrines to "pare down" the amount in controversy. In this regard, the parties contest, among other things, whether the state action concluded liability through the date of the jury verdict, as the district court found, or only through the date on the complaint.

The pleadings and the verdict sheet do not unequivocally establish whether April 15, 1998, or May 3, 2001, was the end-date of the period of liability adjudicated in state court. Scherer's state-court complaint, dated April 15, 1998, sought "damages *to date* [from March 1997]" of $66,000, as well as "[s]uch other and further relief as the court may [deem just] and proper" (emphasis added). Yet the verdict sheet did not give April 15, 1998 as the end-date. Rather, it left that date unspecified, having framed the question of liability thus:

> 2(a) Was Barbara Scherer unable, due to injury or sickness, to engage in the substantial and material duties of her regular occupation for any period of time subsequent to March 13, 1997?
>
> 2(b) If your answer to Question 2(a) is "Yes," specify each period of time during which Barbara Scherer was unable, due to injury or sickness, to engage in the substantial and material duties of her regular occupation.

The jury answered the first question in the negative (without indicating an end date), which made the second question irrelevant.

Some events during trial suggest that the parties and the trial judge thought that the suit

was meant to determine Equitable's liability for benefits through the period marked by the end of the trial. Scherer both maintained that she was totally disabled "continuously" since 1995, and, on several occasions, testified to her state of health as of the time of trial. Her medical witnesses commented on the worsening of her symptoms from 1997 through 2001, and compared MRIs taken in 1997 and in 2000. This testimony was admitted without objection.

In the district court's view, the open-ended questions on the verdict sheet, when read in the light of Scherer's and her doctors' testimony, signify that the parties, the jurors, and the state judge all understood that the task at hand was to find whether disability benefits were owed to Scherer for the period through the time of trial. Accordingly, the district court held the state judgment to preclude any suit for pre-May 3, 2001 benefits.

DISCUSSION

I.

The diversity statute confers original jurisdiction on the federal district courts with respect to "all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States." 28 U.S.C. § 1332(a). Federal Rule of Civil Procedure 12(b)(1) authorizes motions to dismiss for lack of subject matter jurisdiction. We review 12(b)(1) dismissals de novo on the law, and for clear error on the facts. *Virtual Countries, Inc. v. Republic of S. Africa*, 300 F.3d 230, 235 (2d Cir. 2002).

"A party invoking the jurisdiction of the federal court has the burden of proving that it appears to a 'reasonable probability' that the claim is in excess of the statutory jurisdictional

amount." *Tongkook Am., Inc. v. Shipton Sportswear Co.*, 14 F.3d 781, 784 (2d Cir. 1994) (quoting *Moore v. Betit*, 511 F.2d 1004, 1006 (2d Cir. 1975)). This burden is hardly onerous, however, for we recognize "a rebuttable presumption that the face of the complaint is a good faith representation of the actual amount in controversy." *Wolde-Meskel v. Vocational Instruction Project Cmty. Servs., Inc.*, 166 F.3d 59, 63 (2d Cir. 1999).

To overcome the face-of-the-complaint presumption, the party opposing jurisdiction must show "to a legal certainty" that the amount recoverable does not meet the jurisdictional threshold. *Id.* (quoting *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 288-289 (1938)). Our cases have set a high bar for overcoming this presumption. "[T]he legal impossibility of recovery must be so certain as virtually to negative the plaintiff's good faith in asserting the claim." *Chase Manhattan Bank, N.A. v. Am. Nat. Bank and Trust Co. of Chicago*, 93 F.3d 1064, 1070-71 (2d Cir. 1996) (quoting *Tongkook*, 14 F.3d at 785). "[E]ven where [the] allegations leave grave doubt about the likelihood of a recovery of the requisite amount, dismissal is not warranted." *Zacharia v. Harbor Island Spa, Inc.*, 684 F.2d 199, 202 (2d Cir. 1982); *see also Tongkook*, 14 F.3d at 785 ("Where the damages sought are uncertain, the doubt should be resolved in favor of the plaintiff's pleadings.")

Two further points by way of legal background are in order. First, we measure the amount in controversy as of the date of the complaint. Once jurisdiction has attached, it cannot be ousted by subsequent events. *See Wolde-Meskel*, 166 F.3d at 62 (discussing the "time of filing" rule for determining the amount in controversy). Second, affirmative "defenses asserted on the merits" may not be used to whittle down the amount in controversy. *Zacharia*, 684 F.2d at 202. Were such defenses to affect the jurisdictional amount, we have said, "doubt and

ambiguity would surround the jurisdictional base of most diversity litigation from complaint to final judgment[, and i]ssues going to a federal court's power to decide would be hopelessly confused with the merits themselves." *Id.* Even where the complaint itself "discloses the existence of a valid defense," we have declined to consider it in determining whether the jurisdictional threshold is met. *Ochoa v. Interbrew Am., Inc.*, 999 F.2d 626, 628 (2d Cir. 1993) (quoting *Red Cab*, 303 U.S. at 288-289).

The rule that affirmative defenses may not be used in determining the jurisdictional amount does not appear to depend on whether a colorable argument against the defense has been advanced. Thus in *Zacharia*, we cited *Kissick Const. Co. v. First Nat. Bank of Wahoo*, 46 F. Supp. 869 (D. Neb. 1942), as an example of the affirmative defense rule, *see Zacharia*, 684 F.2d at 202, and in *Kissick*, the applicability of the asserted defense (a statute of limitations) was not disputed, *see Kissick*, 46 F. Supp. at 870.

This may seem paradoxical: if it can be said "to a legal certainty" that the defense in question is a winning defense, ought it not be considered for amount-in-controversy purposes? One plausible answer is that because affirmative defenses can be waived, the court cannot *at the time of filing* be certain that any given affirmative defense will be applied to the case. Given the time-of-filing rule, it follows that waiveable "affirmative defenses" are not germane to determining whether the amount-in-controversy requirement has been met.[3]

Whatever the justification, the point for present purposes is that the affirmative defense rule is the law of this circuit, to which we are bound. *See Zacharia*, 684 F.2d at 202.

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[3] This justification for the rule, posited in *Schunk v. Moline M. & S. Co.*, 147 U.S. 500, 505 (1893), is also noted (with further case citations) in Wright & Miller, Federal Practice & Procedure § 3702 at 74 (3d ed. 1998).

II.

The parties dispute whether it can be said "to a legal certainty" that the state trial concluded liability through the date of the jury's verdict. But to explore that question would be a digression, for there is a more fundamental problem with the decision below. The preclusion doctrines, relied on by the district court to calculate the amount in controversy, are waiveable affirmative defenses. *See*, *e.g.*, *Curry v. City of Syracuse*, 316 F.3d 324, 330-31 (2d Cir. 2003) ("[C]ollateral estoppel, like res judicata, is an affirmative defense. As such, it normally must be pled in a timely manner or it may be waived."); *Epperson v. Entertainment Express, Inc.*, 242 F.3d 100, 108 (2d Cir. 2001) ("Collateral estoppel and res judicata . . . are affirmative defenses."); *Leather v. Eyck*, 180 F.3d 420, 424 (2d Cir. 1999) ("[R]es judicata . . . and collateral estoppel . . . are affirmative defenses that must be pleaded by the defendant.")[4]

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[4] Judge Trager, in his powerful dissent, asserts that it is an "erroneous premise that res judicata is a waiveable defense." As noted above, whether or not it should be waiveable, the law of the Circuit is that it is. Judge Trager correctly points out, however, that a court is free to raise that defense *sua sponte*, even if the parties have seemingly waived it. There is, however, no obligation on the part of a court to act *sua sponte* and interpose the defense if it has not been raised. Nor does *Salahuddin* hold that such a *sua sponte* application of res judicata is mandatory. There may be some instances where it would be improper for a court not to consider the defense, and *Salahuddin*'s facts may have been an example. But that is very different from putting a burden on courts to act on their own and invariably apply preclusion defenses. Indeed, the *sua sponte* application of res judicata is not always desirable, given the variety of legal and equitable considerations involved and the difficulties that may be associated with determining its applicability when the parties have not briefed the issue. It follows that we cannot say "to a legal certainty" that in any given case a res judicata defense will be applied. For that reason, the normal rules with respect to affirmative defenses and jurisdiction govern.

The dissent also relies on *Tongkook*, but *Tongkook* is readily distinguishable in that *Tongkook* involved no legal issue but only a factual question that all agreed had been incorrectly determined.

From the affirmative defense rule it follows that the district court's use of res judicata to reduce the "amount in controversy" was not permissible. That amount, for jurisdictional purposes, was the sum put in controversy by the plaintiff's complaint, without regard to the subsequently asserted defense of preclusion.[5]

III.

It is not disputed that if liability for disability benefits from April 16, 1998 to November 19, 2001 is in controversy, then the jurisdictional amount requirement is satisfied. Nor is diversity of citizenship at issue. Accordingly, federal jurisdiction exists. The order of the district court granting Equitable's 12(b)(1) dismissal motion is VACATED, and the case is REMANDED for further proceedings consistent with this opinion.

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[5] The only other circuit to have published an opinion on this issue came to the same result as we would have, although explained in a slightly different way. *See Anderson v. Moorer*, 372 F.2d 747, 750 (5th Cir. 1967) ("[T]he probability of a valid factual defense [here a defense of res judicata], is not sufficient to diminish the amount in controversy and oust the court of jurisdiction."). We do not foreclose the possibility that, in rare circumstances, the affirmative defense rule may admit of exceptions. One possible exception is suggested by the D.C. Circuit's opinion in *Dozier v. Ford Motor Co.*, 702 F.2d 1189 (D.C. Cir. 1983) (Scalia, *J.*). Relying on the Supreme Court's instruction that "[t]he principles of res judicata apply to questions of jurisdiction as well as to other issues," *Am. Sur. Co. v. Baldwin,* 287 U.S. 156, 166 (1932) (Brandeis, *J.*), *Dozier* holds that a federal court determination that a given claim cannot satisfy the amount in controversy requirement must be given preclusive effect. *See Dozier*, 702 F.2d at 1191, 1196. *Dozier* doesn't mention the affirmative defense rule. Where the nonexistence of jurisdiction has itself been determined in a prior action–such that application of the affirmative defense rule would deprive a jurisdictional determination of meaningful finality–*Baldwin* may require that the affirmative defense rule yield.